Copyright © 2017 by The American Society of International Law
doi:10.1017/ajil.2016.3

NOTES AND COMMENTS

PROSECUTORIAL POLITICS: THE ICC'S INFLUENCE IN COLOMBIAN PEACE PROCESSES, 2003–2017

By René Urueña[1]

In August 2016, in Havana, Cuba, the Colombian Government signed a peace agreement with the *Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo*, FARC-EP, after four years of negotiations. The agreement provided a window of hope that Colombia's fifty-year armed struggle, the longest-running conflict in Latin America, would finally come to a close. One actor in these negotiations, whose considerable influence has been underappreciated, is the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). Colombia has been under preliminary examination by the OTP since 2004.[2] In addition to discharging its investigatory function, the ICC prosecutor has actively influenced the negotiation of two peace processes: first, the 2005 peace process with the paramilitaries; and more recently, the tumultuous negotiations with the FARC. This Comment explores the specific pathways of the OTP's influence in the Colombian peace process, and the broader lessons this episode holds for the ICC's work and for the continuing negotiations in Colombia.

The nature of the OTP's engagement, which has evolved over time, can roughly be subdivided into two distinct periods. In the first years of the preliminary examination (2004–2007), the prospect of an ICC intervention in Colombia was perceived within that country as a looming threat, particularly during the peace negotiation with the right-wing paramilitaries in 2005. In this first period, the OTP was an openly influential actor, shaping the deal the government offered to the paramilitaries. However, two dynamics took hold that modulated the influence of the OTP during 2008–2016, the period leading up to the peace agreement with the FARC. First, competition for influence with other actors, especially the Inter-American Commission on Human Rights, meant the ICC was not the only international institution significantly involved with the conflict in Colombia. Second, Colombian institutions and civil society interacted more with the OTP, with numerous consequences. Colombian actors became more knowledgeable with respect to international criminal law and this in turn reduced their fears that they would be blindsided by ICC intervention in the ongoing peace process. Simultaneously, the OTP increasingly gave priority to gaining influence in domestic legal developments regarding the peace process. In this regard, the OTP was remarkably successful—within a certain zone. Colombian actors' increased fluency with international criminal law concepts permitted them to play a more active role, pushing back against some of the OTP's strategies of influence. At the end of this period, the OTP was transformed by Colombia as much as Colombia was transformed by the OTP.

The Colombia case study permits broader observations about the institutional dynamics of complementarity. The mismatch between the breadth of the ICC's mandate and its limited

[1] Associate Professor and Director of Research, Universidad de los Andes School of Law, Colombia.

[2] ICC, *Preliminary Examination: Colombia*, *at* https://www.icc-cpi.int/colombia.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

resources is well-known. International criminal law commentators, and even the OTP itself, have suggested that "positive complementarity" provides a means to overcome the ICC's institutional limitations.[3] Some argue that the ICC can deploy complementarity to catalyze[4] domestic institutions into investigating and prosecuting core crimes. While this strategy is indeed illustrated by the Colombia case, that case also illustrates that the OTP's ability to influence the state with primary jurisdiction may diminish over time. This occurs not only because the threat of prosecution becomes less credible as time passes with no such prosecutions, or even the triggering of a formal investigation, but also because domestic institutions learn how to "speak" to the ICC and can ultimately adapt their own strategies to the Court's anticipated agenda.[5] The Colombian case also illustrates the point that the impact of preliminary examinations may differ depending on how these examinations are initiated. As David Bosco demonstrates in a Note that will be published in the April 2017 issue of this *Journal*,[6] the OTP may be more likely to proceed to a full investigation in cases involving referrals, rather than where preliminary examinations emerge through the prosecutor's *proprio motu* initiative. Lacking state or UN Security Council cooperation, *proprio motu* preliminary examinations may also proceed for longer periods of time than those that emerge from referrals, and delay alone may make the initiation of a formal investigation less likely.

In addition to this evolution on the domestic side, the OTP's influence in Colombia was curtailed by other international developments. Specifically, both the Inter-American regime of human rights and the extradition of Colombian nationals to the United States had crucial, albeit distinct, impacts on the OTP´s preliminary examination. The capacity for other international or foreign actors to exert influence on domestic developments alongside the ICC, especially as preliminary examinations become protracted, is a variable that has been ignored in most discussions of positive complementarity.

This Comment explores these issues first, in Section I, by providing some historical context for Colombia's ratification of the Rome Statute. Section II explores the period of 2004–2007, including the peace process with the paramilitaries. Section III discusses a turning point in the peace process: the large-scale extradition, in 2008, of paramilitaries to the United States. Section IV turns to the more recent negotiations with the FARC, in 2009–2017, with a focus on the evolving role of the ICC. This section also comments briefly on the outcome of the popular referendum rejecting the peace agreement, the adoption of the deal by the Colombian Congress, and the first steps of its implementation. Finally, Section V concludes with some suggestions for ICC institutional reforms.

[3] *See* ICC-OTP, *Strategic Plan June 2012–2015*, paras. 64–67 (Oct. 11, 2013), *at* https://www.icc-cpi.int/icc-docs/otp/OTP-Strategic-Plan-2013.pdf; William Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 Crim. L. Forum 59–85 (2008); Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 Crim. L. Forum 87–113 (2008); Carey Shenkman, *Catalyzing National Judicial Capacity: The ICC's First Crimes Against Humanity Outside Armed Conflict*, 87 N.Y.U. L. Rev. 1210 (2012).

[4] On the "catalyst" effect, see Jann K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions 309–39 (2008).

[5] In this sense, the Colombian case resonates with some of Sarah Nouwen's findings in Uganda and Sudan, where, she reports, ICC intervention failed to catalyze genuine domestic prosecutions. *See* Sarah M. H. Nouwen, Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan 337–405 (2013).

[6] David L. Bosco, *Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examination*, 111 AJIL (2017, forthcoming).

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

I. Colombia's Ratification of the Rome Statute: Context and Implications

From the outset, Colombian lawmakers approached the possibility of ratifying the Rome Statute with one overarching concern in mind: how would acceding to the ICC treaty affect the ongoing peace process?[7] Their concern made perfect sense. Colombians had endured fifty years of intense violence, and as the probability of a definitive military winner became less and less likely, peace negotiations assumed an ever-greater significance.[8] More to the point, all five peace processes that had been attempted since 1982 considered some measure of amnesty for crimes that would fall under the jurisdiction of the ICC.

Congress' consideration of the Rome Statute in 2001 was preceded by a convergence of factors that changed the dynamics of the conflict. First, the Colombian government entered into the highest stakes phase in its negotiations with the FARC. In 1998, the government agreed to demilitarize an area the size of Switzerland in the south of the country, leaving it under the control of the FARC—a move that considerably strengthened the military position of the guerrilla group. A year later, the U.S.-led "Plan Colombia"—a civil and military aid package of USD 1.5 billion—was officially announced. Meanwhile, right-wing paramilitaries were at the height of their power as a result of the decision, in 1996, to merge independent groups and create an organization called United Self-Defenses of Colombia (*Autodefensas Unidas de Colombia*, or AUC). By 2001, the resulting gains in military capability and political coherence meant that AUC, which commanded a force of eight thousand soldiers, had become an independent, self-funded actor in the conflict.[9]

The result was an increase in military capacity on all sides—a development which, predictably, had far-reaching consequences. Noncombatants became, for the first time, the main victims of the conflict. Whereas in 1996, the guerrillas and the paramilitaries produced roughly two hundred civilian casualties each, there was a sharp increase in 1998, when the paramilitaries and the guerrilla forces collectively caused 1,100 civilian casualties, and again in 2001, when the number surged to 1,600.[10] The size of the displaced population peaked in this period of time as well.[11]

By 2002, when Colombia joined the Rome Statute, the conflict had become a veritable humanitarian crisis. Thousands of civilians were being killed and displaced; indeed, the scale of the conflict was such that a huge area in the middle of South America was in effect lawless. Thus, in the context of hitherto unseen violence, and desperate for a peace deal, Colombia embraced the ICC. However, joining gave rise to a structural tension. On the one hand, the ICC gave the government a sorely needed additional tool to induce the

[7] *See* Informe de Ponencia Primer Debate Proyecto Acto Legislativo 014 de 2001 Senado, 114 Gac. Congr. 1, 4–5 (2001) (Colom.).

[8] In fact, one influential interpretation suggests that all of Colombia's constitutional history can be read as a tradition of peace deals-turned constitutions. *See* Hernando Valencia Villa, Cartas de Batalla: Una Crítica del Constitucionalismo Colombiano, 11–23 (1987).

[9] Alfredo Rangel, *¿Adónde van los Paramilitares?*, *in* El Poder Paramilitar 11–23 (Alfredo Rangel ed., 2005).

[10] Jorge Restrepo, Michael Spagat & Juan Vargas, *The Dynamics of the Colombian Civil Conflict: A New Dataset*, 21 Homo Oeconomicus 396–428 (2004).

[11] Ana Maria Ibáñez Londoño, *El Desplazamiento Forzoso en Colombia: Un Camino Sin Retorno Hacia la Pobreza*, 48 Cuad. Geográficos 301–03 (2011).

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

guerrillas to join negotiations.[12] On the other, it constituted a threat to the government's ability to credibly offer amnesty to the rebels. At the time, an amnesty offer was the central—if not the only—negotiating chip the Colombian government had at its disposal. Mindful of this reality, Colombia entered a declaration stating that the Statute could not prevent it from granting amnesties for political crimes, and availed itself of the possibility of suspending the ICC's jurisdiction over war crimes for seven years, as provided for in Article 124 of the Statute.

II. Who's Afraid of the ICC? The OTP's Influence in Colombia, 2004–2007

Just two years after Colombia's ratification of the Rome Statute, in 2004, the OTP opened a preliminary examination regarding that country. The OTP's intervention was framed as an instance of "positive complementarity,"[13] reflecting former ICC Prosecutor Moreno-Ocampo's general approach during his tenure in office.[14] This was not just an academic gloss on the OTP's actions: as leaked State Department cables show, Moreno-Ocampo acknowledged that his strategy in Colombia was to spur domestic institutions to act in compliance with international norms, including through domestic prosecution of war criminals.[15]

OTP policy documents indicate that opening a preliminary examination is a signal to the state in question of the ICC prosecutor's concern with a situation, with the goal of gaining a foothold for the OTP to shape domestic developments in a way that fulfills its mandate.[16] In Colombia, this signaling process proved effective—with a twist. In this first period of its preliminary examination, the OTP was an influential force shaping the deal offered by the government to the paramilitaries. However, the OTP's influence was exercised in an environment already crowded by preexisting norms and institutions, especially relating to human rights. Although the OTP's powers under the Rome Statute were, at the time, a credible threat to the paramilitaries and the Colombian government, this leverage changed in shape and intensity as the OTP interacted with other international institutions also operating in the background of the situation, particularly the Inter-American Court of Human Rights.

Two Years of Silence

Moreno-Ocampo did not act right away upon Colombia's ratification of the Rome Statute; he instead allowed domestic developments to unfold without intervention. Following a unilateral ceasefire announced by the paramilitaries in late 2002, former Colombian President Álvaro Uribe undertook negotiations with paramilitary groups beginning in July of 2003. During the negotiations, the prospect of ICC intervention was an acute concern for the

[12] This rationale was clearly laid out during the debate in the Colombian Congress regarding what was then called a "humanitarian exchange" with the FARC. *See* Senado de la República, Acta Número 23 de la Sesión Ordinaria del 12 de Noviembre de 2002, 529 Gac. Congr. (Nov. 20, 2002) (Colom.).

[13] *See generally* Burke-White, *supra* note 3.

[14] Luis Moreno-Ocampo, Prosecutor, International Criminal Court, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 2 (June 16, 2003), *at* http://www.iccnow.org/documents/MorenoOcampo16June03.pdf.

[15] *Cable 04THEHAGUE1885_a, ICC: GETTING DOWN TO BUSINESS?*, Wikileaks, para. 7, *at* https://wikileaks.org/plusd/cables/04THEHAGUE1885_a.html.

[16] *See* ICC-OTP, *Policy Paper on Preliminary Examinations 2013* (Nov. 2013), *at* https://www.icc-cpi.int/icc-docs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

paramilitaries. Leaked recordings from the negotiations show Jorge 40, one of the paramilitaries' negotiators, expressly mentioning fear of an ICC prosecution to the government.[17] Notably, the government negotiator responded to this concern by stating that "the ICC is no problem" due to "the fact that the government is offering a draft law that foresees prison time is important, because it will block the action of the International Criminal Court."[18]

The draft law in question was the Alternative Sentencing Bill of 2003, which represented the opening offer of the Colombian government to the paramilitaries. The government's approach was to prioritize "peace and reconciliation" over criminal punishment.[19] For their part, the paramilitaries publicly proclaimed that none of their members would spend a single day in prison.[20] Thus, unsurprisingly, the Alternative Sentencing Bill provided for suspending the criminal sentence for a maximum of five years for any member of an armed group who agreed to demobilize, under the supervision of a judge.[21] After this period, the judge could legally pardon the sentenced person. As the government's negotiator alluded, this legal formality was a preemptive move designed to prevent intervention by the OTP.

As the paramilitaries' apprehension about the ICC makes clear, the OTP could exert some influence on the peace negotiations, making its passivity until this point a puzzle. However, the politics of international criminal law may explain why it would be hesitant to intervene. Colombia had traditionally been a close U.S. ally—a relationship that only grew stronger in the aftermath of the 9/11 attacks, when the Colombian conflict was reframed in terms of the U.S.-led "War on Terror."[22] As the negotiations initiated in 2003 unfolded, the Bush Administration openly tried to marginalize the ICC. Chief among U.S. strategies for achieving this marginalization was the push for a network of bilateral immunity agreements (known as Article 98 Agreements), limiting the jurisdiction of the ICC with regard to U.S. nationals.[23] At the same time, the United States had insisted on ICC Statute Article 16 deferrals when adopting UN Security Council resolutions reauthorizing peacekeeping missions.[24] Moreover, the war in Iraq had begun in March 2003 (with Colombia as an early supporter), and the possibility of an ICC investigation of war crimes committed by coalition forces still seemed open. In the face of the United States' multifaceted strategy to marginalize the ICC,[25] Prosecutor Moreno-Ocampo urgently tried to signal that the ICC did not threaten core U.S.

[17] *See 'Jorge 40,' Rodrigo Tovar Pupo*, VERDAD ABIERTA, *at* http://www.verdadabierta.com/victimarios/691-perfil-rodrigo-tovar-pupo-alias-jorge-40.

[18] *Revelaciones Explosivas*, REVISTA SEMANA (2004, audio available).

[19] Explanatory Statement of the Proposed Statutory Law 85 of 2003, CONG. GAZETTE 436 (2003) (Colom.).

[20] *See* Salvatore Mancuso, Discurso de Salvatore Mancuso ante el Congreso de la República (July 28, 2004), *available at* http://lasillavacia.com/sites/default/files/media/docs/17789/discurso_salvatore_mancuso.pdf (Salvatore Mancuso's speech before the Colombian Congress on July 2004).

[21] This description of the bill is based on: René Urueña, Diego Acosta Arcarazo & Russell Buchan, *Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law*, 26 CRIM. L. FORUM 291–318 (2015).

[22] *See* Adam Isacson, *Optimism, Pessimism, and Terrorism: The United States and Colombia in 2003*, 10 BROWN J. WORLD AFF. 245 (2004).

[23] *See* David A. Tallman, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L.J. 1033 (2003). Colombia had such an Article 98 Agreement with the United States.

[24] *See* Neha Jain, *A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court*, 16 EUR. J. INT'L L. 239–54 (2005).

[25] *See* DAVID L. BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 87–101 (2014).

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

interests.[26] The Uribe government may have drawn encouragement from the political precariousness of the ICC's position. Thus, while the ICC was indeed an acute concern for the paramilitaries, in 2003 at least, geopolitics seemed to point to a small risk of actual intervention.

The Shadow of the Inter-American Court of Human Rights

While the OTP remained silent, the Alternative Sentencing Bill triggered a strong backlash from human rights organizations in Colombia. These advocates argued that the bill promoted impunity in violation of the victims' rights,[27] and pointed to the fact that it undermined the standards developed by the Inter-American System of Human Rights. The Inter-American Court of Human Rights' (IACtHR) jurisprudence, especially in relation to the democratic transition in Latin America, had by this time repeatedly emphasized the obligation of states to ensure victims' rights to the truth,[28] a judicial process, and full reparations for wrongdoing.[29] Most importantly, the IACtHR had already rejected blanket amnesties in transitional justice enacted in Peru,[30] which gave perpetrators of atrocities short sentences.[31] The leading case that posed an obstacle for the Colombian government was *Barrios Altos*,[32] which held that "auto-amnesties" constituted a violation of the American Convention on Human Rights, and therefore "lacked legal effects."[33] The combined pressure of human rights advocacy and the looming threat of the *Barrios Altos* decision made it seem like a real possibility that the IACtHR would invalidate the Alternative Sentencing Bill, and because of that, the Colombian government decided to withdraw it from consideration by the Colombian Congress in 2003.

The OTP Enters the Game (to Little Effect)

Nonetheless, limited, but important, progress was made on the demobilization front. In July 2003, the Uribe Government and the AUC signed the Pact of Santafé de Ralito, providing the political basis for the latter's demobilization. By mid-2004, more than two thousand paramilitaries had already demobilized.[34] Moreover, the *Bloque Catacumbo*—a 1,500-person force that constituted one of the strongest and most politically visible paramilitary fronts—was preparing for demobilization in December 2004. There was, however, still no

[26] *Id.* at 89–91.

[27] *See, e.g.*, Gustavo Gallón & Catalina Díaz Gómez, *Justicia Simulada: Una Propuesta Indecente* (2003), *available at* http://escolapau.uab.cat/img/programas/procesos/seminario/semi003.pdf.

[28] Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT'L L. 977 (2002).

[29] *See* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 230–89 (2013).

[30] Case of Barrios Altos v. Perú, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, paras. 41–44 (Mar. 14, 2001) [hereinafter *Barrios Altos*].

[31] *See* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203–30 (2011).

[32] *Barrios Altos*, *supra* note 30.

[33] *Id.*, paras. 41–44.

[34] Germán Darío Valencia Agudelo, *Reconstrucción Analítica del Proceso de Desarme, Desmovilización y Reinserción con las Autodefensas Unidas de Colombia, 2002–2007*, PERF. COYUNT. ECONÓMICA 147, 166 (2007). The calculations are based on the data set of the Colombian High Commissioner for Peace.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

overarching legal framework for demobilization, and the paramilitaries remained concerned that an ICC prosecution would undermine their strategy.

It was at precisely this moment, in June 2004, that the OTP opened its preliminary examination. This move gave Prosecutor Moreno-Ocampo enormous leverage to influence the outcome of the peace negotiations with the paramilitaries. However, the OTP did little to inform Colombia about what this examination entailed. Remarkably, the first official communication with Colombia would only occur in the spring of 2005, an omission that remains largely unexplained. In light of this silence, the IACtHR's jurisprudence was the only meaningful guidance on the concept of complementarity available to the government, the paramilitaries, and human rights activists. As a result, the strict requirements that the IACtHR had developed in its amnesties jurisprudence (particularly *Barrios Altos*) became their touchstone for assessing what domestic actions would be sufficient to prevent ICC intervention. When the OTP finally opened its preliminary examination, it entered an environment already densely populated in terms of international legal obligations and legal narratives concerning the atrocities possibly subject to the jurisdiction of the ICC.

The result of this intermingling of standards was the Justice and Peace Law of 2005 (JPL), which was a complete departure from the government's prior rhetoric. The JPL wholeheartedly embraced the language of human rights, truth, and reparation for the victims.[35] The new law was modeled on the Inter-American approach to transitional justice, as exemplified in IACtHR case law. As such, it represented a "maximalist model," "in the sense that it require[d] that *all* perpetrators of war crimes and crimes against humanity [be] prosecuted and sentenced."[36] The incentive for negotiation was the notion of "sentencing alternativity," which basically entailed replacing the "main sentence" required by the law for the crime (e.g., forty years for homicide) with an "alternative sentence" (say, a maximum of eight years), in exchange for demobilization and contributions to truth and effective reparation to the victims.

The maximalist model can thus be understood as the result of the OTP's influence in Colombia, albeit in a counterintuitive way. Counterintuitive because while the overall risk of an ICC intervention was an important factor behind the process that led to the JPL, the jurisprudence of a different international court—whose mandate comprised an entirely different set of norms—informed Colombian actors' views of what was required to avoid ICC prosecution. In this instance, then, human rights norms could be seen as complementing the OTP's preliminary examination process by supplying a potential model for operationalizing positive complementarity. Although the ostensibly rights-affirming approach of the bill never translated into concrete results,[37] the passive approach of the OTP was about to change, signaling an expanded scope of influence in future phases of the peace process.

[35] Rodrigo Uprimny & María Paula Saffon, *Usos y Abusos de la Justicia Transicional en Colombia*, ANU. DERECHOS HUM. - UNIV. CHILE 165, 172 (2008).

[36] The description of the LPJ is based on Urueña, Acosta Arcarazo & Buchan, *supra* note 21, at 295.

[37] Victims' organizations, human rights activists, and some scholars were quick to argue that although the JPL was designed to resemble a legal framework for guaranteeing human rights (particularly as compared to the Alternative Sentencing Bill of 2003), it would not actually live up to these aspirations in practice. This intuition has proven correct. Eleven years after its adoption, out of 4,408 demobilized AUC militants, who confessed 25,757 homicides and 1,046 massacres, only thirty-five sentences have been passed, of which only nine are final. Data of the Colombian prosecutor *at* http://www.fiscalia.gov.co/jyp/unidad-de-justicia-y-paz.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

Jockeying for Influence: The ICC v. the Inter-American Court of Human Rights?

The U.S. attitude toward the ICC began to change between 2004 and 2005. Faced with a possible Security Council referral of the situation in Darfur, the Bush administration was more concerned with the situation in Sudan than with continuing its marginalization strategy.[38] Thus, despite its general opposition to the ICC, the United States abstained from the Security Council vote referring the Darfur situation to the ICC in March 2005, bringing a thaw in its relationship with the ICC.[39] An easing of tensions with the United States facilitated the ICC taking a more active role in Colombia. Once this improved context took hold, Moreno-Ocampo became much more active in that country. On March 2, 2005, the same month as the Darfur referral, the OTP finally informed the Colombian government of the ongoing preliminary examination.[40]

At the same time, the JPL encountered implementation challenges, particularly due to the ambitious agenda created by the decision by its drafters to follow the maximalist Inter-American approach. The Justice and Peace Unit of the Colombian Office of the Prosecutor, an institution created to implement the JPL, lacked the requisite resources to carry out its monumental task.[41] Moreover, the cases it did bring concentrated mainly on the individual responsibility of perpetrators for particular incidents, which obscured contextual patterns of violence, and left unpunished crimes for which prosecution required proving more complex forms of liability.[42] The Colombian Supreme Court contributed to these shortcomings by requiring the prosecutor to bring charges against individual paramilitary members not only for the most easily proven crimes, but also for their roles in the larger criminal machinery of the paramilitary operation.[43] This decision heightened the investigatory

[38] Bosco, *supra* note 25, at 110–15.

[39] *Id.* at 112.

[40] ICC-OTP, *Situation in Colombia: Interim Report*, para. 2 (2012), *at* https://www.icc-cpi.int/nr/rdonlyres/3d3055bd-16e2-4c83-ba85-35bcfd2a7922/285102/otpcolombiapublicinterimreportnovember2012.pdf [hereinafter OTP Situation in Colombia Report].

[41] Human Rights Watch, *Breaking the Grip?: Obstacles to Justice for Paramilitary Mafias in Colombia* 33 (Oct. 16, 2008), *at* https://www.hrw.org/report/2008/10/16/breaking-grip/obstacles-justice-paramilitary-mafias-colombia. Lack of resources was not a strategy to starve the Unit and undermine its work. The Colombian Prosecutor's Office did make an effort to enhance the Unit's capacity; for example, in 2008, the Unit went from twenty-three to fifty-seven prosecutors, and, in total, from two hundred to almost five hundred employees. However, the sheer magnitude of the challenge (thousands of demobilized militia) made all this effort insufficient. International Crisis Group, *Corregir el Curso: Las Víctimas y la Ley de Justicia y Paz en Colombia. Informe Sobre América Latina*, No. 29, 9 (2008).

[42] Olga Lucía Gaitán, La Construcción de Sentencias de Justicia y Paz y de la "Parapolítica" 47–51 (2014). In fact, the JPL had to be reformed in order to achieve more complex forms of criminal investigation, under Law 1592 of 2012.

[43] This is the problem of "imputaciones parciales," which led the Colombian Supreme Court to overthrow the first final decision in the context of the JPL, concerning a mid-level paramilitary known as El Loro. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, Auto del 31 de julio de 2009, Rad. 31539 (Colom.). While a doctrinal criminal law issue in its framing, this is also a problem of investigative capacity: investigating and prosecuting complex criminal organizations is costly and time consuming. The Colombian Prosecutor preferred to be allowed to charge demobilized paramilitaries for some individual charges that were easier to prove, a strategy that would keep the Justice and Peace machinery moving, and would facilitate having some paramilitaries do some prison time for some crimes. The alternative, which the prosecutor rejected, was to bring all charges at the same time, which implied investigating complex criminal activities, but risked either taking so long that the demobilized paramilitaries would walk free, or being forced to present weak evidence to the judge. Originally, the Colombian Supreme Court accepted, with some caveats, the possibility that only some charges were brought against the demobilized (Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

burden on the prosecutor and contributed to the potential for delays in the administration of justice.

As these challenges began to emerge, Moreno-Ocampo made his first official visit to Colombia in October 2007.[44] The overall atmosphere was one of cooperation between the OTP and Colombian authorities.[45] More importantly, Moreno-Ocampo delivered his first specific, substantive signal: while he stressed that there could not be "amnesties . . . for those responsible for grave human rights violations—even as part of a peace process," he "urged Colombian prosecutors to focus their efforts on paramilitary leaders rather than rank-and-file members."[46] This was a crucial message. The Colombian prosecution unit charged with carrying out the JPL's maximalist vision—that all perpetrators had to be prosecuted—was proving unable to perform. And now the ICC prosecutor, whose intervention was the actual deterrent for both the government and the paramilitaries, was indicating that the principle of complementarity only required the prosecution of the most important perpetrators.

The OTP's message was in sharp contrast with signals emanating from the Inter-American Commission on Human Rights. In the early years of the OTP's preliminary examination in Colombia (2004–2007), the armed conflict—particularly the atrocities committed by the paramilitaries—had been subject to the scrutiny of the Inter-American Court on at least four occasions.[47] Three days before Moreno-Ocampo arrived in Bogotá in October 2007, the Inter-American Commission on Human Rights had issued its report on the JPL.[48] Despite the fact that the JPL was designed with the Inter-American standards in mind, the

Penal, Sentencia del 23 de julio de 2008, Rad. 30120 (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, Sentencia del 9 de febrero de 2009, Rad. 30955 (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, Sentencia del 11 de mayo de 2009, Rad. 31290 (Colom.)). Human Rights NGOs rejected this approach, as these partial charges undermined the rights of victims to know the whole truth regarding the role of the individual paramilitary in the context of the paramilitary criminal organization as a whole (if the paramilitary is tried only for the murder of X, the victims of all his other crimes will have no access to truth and reparation). (*See* Comisión Colombiana de Juristas, *¿Imputaciones Parciales o Derechos Parciales?*, Serie Sobre los Derechos de las Víctimas y la Aplicación de la Ley 975 32 (Bogotá: Comisión Colombiana de Juristas, 2009)). The Court seemed to agree, and decided then to require all charges to be brought (Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, auto de 31 de julio de 2009, Rad. 31539 (Colom.)). The investigative threshold imposed by the Supreme Court to the Prosecutor, then, had an important impact on the latter's resources. Eventually, the Supreme Court moderated its position, and exceptionally accepted *some* partial charges in particularly complex cases (Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, auto del 14 de diciembre de 2009, Rad. 32575 (Colom.)). The demanding overall standard, though, remained, making prosecutions harder.

[44] *Carta Enviada por el Fiscal Moreno de la CPI*, El Espectador (Aug. 16, 2008), *at* http://www.elespectador.com/node/32589/impreso/politica.

[45] *Corte Penal Internacional le Sigue la Pista a la Parapolítica*, El Tiempo (Oct. 21, 2007), *at* http://www.eltiempo.com/archivo/documento/MAM-2698429.

[46] On the private conversations: *GOC'S POSSIBLE SHIFT ON INTERNATIONAL CRIMINAL COURT PROVISION. 07BOGOTA7671_a*, Wikileaks, *at* https://wikileaks.org/plusd/cables/07BOGOTA7671_a.html. On the public statements: Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 Ariz. J. Int'l Comp. L. 49 (2009).

[47] Case of the Rochela Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007) [hereinafter *Rochela Massacre*]; Case of the Ituango Massacres v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006); Case of the Pueblo Bello Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); Case of the "Massacre of Mapiripán" v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 14, 2005).

[48] Inter-American Commission on Human Rights, *Informe Sobre la Implementación de la Ley de Justicia y Paz: Etapas Iniciales del Proceso de Desmovilización de las AUC y Primeras Diligencias Judiciales*, OEA/Ser.L/V/II.129 Doc. 6 2, paras. 49–52 (Oct. 2007).

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

Commission was quite critical of the law's implementation,[49] as the JPL failed to achieve its own maximalist objectives. In contrast, Moreno-Ocampo's suggestion to target only high-level paramilitary operatives seemed a much more attainable goal, compared with the strict Inter-American standard.

The clash between the two systems could have been worse. Just months earlier, in May 2007, the IACtHR had issued its decision regarding the Rochela Massacre, which involved the massacre of twelve prosecutors and judicial investigators in 1989 by Colombian paramilitaries.[50] In that case, the victims had explicitly requested that the IACtHR decide whether the JPL breached the American Convention of Human Rights.[51] In so doing, the victims were asking the Court to exercise what has been aptly described by Alexandra Huneeus as a "quasi-criminal" jurisdiction; namely "ordering, monitoring, and guiding national prosecutions."[52] Had the IACtHR taken up the Rochela Massacre victims' request, it would have set up an explicit conflict between the IACtHR and the OTP. However, the Court declined to opine on the JPL vis-à-vis the American Convention, given that the law was still in the early phases of implementation.

Although this act of restraint staved off the possibility of an overt conflict, the underlying tension was evident in the Court's opinion. The Court "deem[ed] it important to indicate, based on its jurisprudence, some aspects of the principles, guarantees and duties that must accompany the application of the juridical framework of the demobilization process."[53] The principles, guarantees, and duties in question were those of the demanding *Barrios Altos* framework—complemented with a more recent decision, *La Cantuta*, which confirmed the strict approach to amnesties.[54] For the reasons explored earlier, this position of the IACtHR was perceived by the Colombian government as a threat to its conduct of the peace process. By contrast, the OTP appeared to be a friendly actor, who seemed, at the time, to be receptive to the position of the United States (a key Uribe ally). Crucially, the OTP seemed to be supportive, in general terms, of the JPL process and the deal it offered the paramilitaries.

By mid-2007, the OTP seemed to be carrying the day. The discussion drifted away from the maximalist model and toward a more minimalist approach consisting of prosecution of only the most important perpetrators. Whereas previously, the OTP's influence was prominent only as a spur to action—the specific content of which was informed by human rights standards drawn from the Inter-American system—now the OTP represented a competing narrative with different implications for prosecution strategies. Without necessarily undermining the impact of the Inter-American regime in Colombia, this competing narrative unquestionably created space for the emergence of new domestic strategies for complying with international legal obligations vis-à-vis the conflict.

[49] *Id.*, paras. 78–100.

[50] *Rochela Massacre, supra* note 47.

[51] *Id.*, paras. 191–92.

[52] Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-criminal Jurisdiction of the Human Rights Courts*, 107 AJIL 1, 2 (2013).

[53] *Rochela Massacre*, *supra* note 47, para. 192.

[54] Case of La Cantuta v. Perú, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

III. A Turning Point: Extradition to the United States and the Limits of the OTP's Influence in Colombia

Jockeying for influence between the OTP and the IACtHR came to a sudden end on May 13, 2008, when the Colombian government unexpectedly extradited fourteen senior paramilitary leaders to the United States on drug charges.[55] Given that these individuals were part of the JPL process, and could have fallen within the jurisdiction of the ICC, extradition put the OTP's preliminary examination in clear conflict with the extradition procedure that was already in place between the United States and Colombia.[56] At the end of the day, the threat of ICC prosecution proved a less pressing threat than the specter of drug charges in the United States. On the U.S. side, the logic was clear: drug trafficking was the main priority for the Bush administration in Colombia; the transitional justice process was a distant second. For the paramilitaries' victims, however, the extradition meant that the only benefit that justified accepting commuted sentences for the perpetrators suddenly disappeared: very little truth or reparation for crimes against humanity could be expected to flow from bringing drug charges in the United States.

The extraditions drew an anxious response from the OTP, which promptly wrote to the Colombian ambassador in The Hague, asking whether "the extradition of the paramilitary leaders constitutes an obstacle for the investigation of the above-mentioned politicians."[57] However, Moreno-Ocampo was powerless to do much more. Despite its efforts to influence the outcomes of the peace process with the paramilitaries, the OTP's strategy of using the preliminary examination to prod developments on the domestic side had run headlong into Colombia's extradition obligations vis-á-vis the United States. When Moreno-Ocampo returned to Colombia in August 2008 in response to the extraditions, he nonetheless remained silent on the matter. It was clear that U.S. action had established a limit to the OTP's latitude in Colombia.

Although the U.S. Department of Justice claimed victims would have access to perpetrators, and that the JPL process would not be affected,[58] in point of fact the extraditions were

[55] *Extradición Masiva de Paramilitares*, BBC Mundo (May 13, 2008), *at* http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7398000/7398251.stm; *Extradición Masiva de Paramilitares*, Semana (May 13, 2008), *at* http://www.semana.com/on-line/articulo/extradicion-masiva-paramilitares/92677-3.

[56] There is a signed and ratified extradition treaty between Colombia and the United States. Extradition Treaty with the Republic of Colombia, U.S.-Colom., *opened for signature* Sept. 14, 1979, S. Treaty Doc. No. 97-8 (entered into force March 2, 1982) (Diario Oficial, Year CXVII, No. 35.643, p. 401 (1980)). However, in June 1987, the middle of the drug wars with the Medellín Cartel, the Colombian law approving the treaty was declared unconstitutional in Colombia (Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, Sentencia del 2 de diciembre de 1986, Rad. 1558 (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, Sentencia del 25 de junio de 1987, Rad. 1558 (Colom.)). However, the Colombian government never denounced the treaty. The United States usually includes the treaty in the State Department's "Treaties in Force" publication (see http://www.state.gov/s/l/treaty/tif/index.htm). However, since the Treaty is no longer valid under Colombian law, extraditions of Colombian nationals to the United States are framed, in Colombian domestic law, as a unilateral response to the extradition request from the United States, regulated solely by Colombian law.

[57] *Carta Enviada por el Fiscal Moreno de la CPI*, El Espectador (Aug. 16, 2008), *at* http://www.elespectador.com/impreso/politica/articuloimpreso-carta-enviada-el-fiscal-moreno-de-cpi.

[58] U.S. Dep't of Justice Press Release, 14 Members of Colombian Paramilitary Group Extradited to the United States to Face U.S. Drug Charges (May 13, 2008), *at* https://www.justice.gov/archive/opa/pr/2008/May/08-opa-414.html; *see also*, Remarks by U.S. Ambassador to Colombia William Brownfield at a Press Conference in Bogotá (May 3, 2008), *available at* http://bogota.usembassy.gov/pc_001_13052008.html.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

quite consequential. They posed a significant obstacle for investigations, and also prevented the victims of the extradited perpetrators from having access to truth, justice, or reparations. Unsurprisingly, few Colombian victims could obtain access to defendants in the United States, and reparations have not been forthcoming.[59] Eight years later, in 2016, the former paramilitaries who were extradited remain in the United States serving out sentences, resulting in even more challenges to truth-seeking and other key aspects of the transitional justice process. Of the twenty paramilitary members who were ultimately extradited,[60] fifteen never resumed "open confessions" within the JPL framework.[61] Despite the Department of Justice's rhetorical commitment to the JPL process, plea deals were offered to several of these defendants on the drug charges, pursuant to which sentences were reduced without ever requiring cooperation with the JPL.[62] The average prison term for the extradited paramilitary leaders is only ten years, and, to make matters worse, some of them received the right to stay in the United States with their families upon release.[63]

The extraditions dealt a tremendous blow to the JPL process. Although the Justice and Peace Unit continued prosecuting mid- and lower-level members of the paramilitaries, the extraditions made clear that prosecutions in Colombia of the higher echelons would face serious resistance from the Uribe government. For the OTP, the extraditions meant the loss of both leverage and the prospect of prosecution. In the OTP's 2012 Interim Report, the OTP finally gave up on the extradited paramilitaries. Although the perpetrators were convicted in the United States for drug charges, the OTP concluded that their cases would not be admissible because the conduct for which they had been convicted in Colombia constituted "crimes within the subject-matter jurisdiction of the ICC. . . ."[64] Ultimately, the episode illustrates that the United States' interest in cracking down on drug trafficking created an external, non-negotiable limit on the OTP's influence in Colombia.

IV. Negotiating with the FARC: The OTP's Influence in Colombia, 2008–2017

Since 2009, after negotiating with the paramilitaries, Colombian President Uribe had been in secret talks with the FARC. However, these talks ground to a halt when Uribe had a public

[59] *See* International Human Rights Law Clinic - University of California, Berkeley, School of Law, *Truth Behind Bars: Colombian Paramilitary Leaders in U.S. Custody* (Feb. 2010), *available at* https://repositories.lib.utexas.edu/bitstream/handle/2152/7467/Truthbehindbars-Berkeley.pdf?sequence=2&isAllowed=y. For the perspective of victims, see Comisión Intereclesial de Justicia y Paz, Colectivo de Abogados José Alvear Restrepo & Project Counselling Service, *La Extradición: Aprendizajes y Recomendaciones Desde las Víctima* (2014), *at* http://www.colectivodeabogados.org/IMG/pdf/extradicion.pdf. For the U.S. Department of State, in contrast, a rigorous cooperation has existed. *See* U.S. Dep't of State, Memorandum of Justification Concerning Human Rights Conditions with Respect to Assistance for the Colombian Armed Forces (2010).

[60] This figure includes the fourteen individuals who were extradited in May of 2008, as well as six who were extradited thereafter.

[61] Alejandro Chehtman, *The Impact of the ICC in Colombia: Positive Complementarity on Trial* 30 (DOMAC/9 Working Paper, 2011).

[62] Comisión Colombiana de Juristas, *La Metáfora del Desmantelamiento de los Grupos Paramilitares* 297–98, and references (March, 2010), *at* http://www.coljuristas.org/documentos/libros_e_informes/la_metafora.pdf; *see also id.*

[63] Deborah Sontag, *The Secret History of Colombia's Paramilitaries and the U.S. War on Drugs*, N.Y. Times, Sept. 10, 2016, at A1.

[64] OTP Situation in Colombia Report, *supra* note 40.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

confrontation in 2010 with President Hugo Chávez, the former president of Venezuela, concerning the FARC's alleged used of Venezuelan territory for protection.[65] In August of that same year, Juan Manuel Santos became president of Colombia and immediately began exploring venues for opening his own secret negotiations with the FARC.[66] From 2010 until 2011, as secret talks continued, the OTP was mostly silent with regard to Colombia. Most likely, the prosecutor's concerns were elsewhere: on December 2010, the OTP filed charges against Uhuru Kenyatta over post-electoral violence in Kenya in 2008, leading to the ill-fated cross-examination of Kenyatta by Moreno-Ocampo himself, in September of 2011.[67]

In August 2012, President Santos announced that Colombia was formally kicking off yet another peace process—this time with the FARC. By this time, Prosecutor Moreno-Ocampo had left office, and was replaced (as of June 2012) by Fatou Bensouda. A deputy prosecutor at the ICC since 2004, Bensouda was well-versed in the OTP's strategy with regard to Colombia. Moreover, she was under severe pressure to prove that the ICC did not suffer from an "African bias."[68] To many, Colombia looked like an ideal candidate to expand the ICC's geographical scope and, in a way, that proved to be the case. The 2008–2017 period, which ended with the peace agreement that was rejected by voters and eventually adopted by Congress, showed that the OTP was keen on directly influencing domestic legal developments regarding the peace process, and that it was remarkably successful in doing so, up to a point. Colombian institutions and civil society, which had become more articulate in international criminal law through engagement with the OTP and other international actors, came to play a more active role in this period, pushing back against some of the OTP's strategies for influence. At the end of this period, influence proved to flow both from the OTP to Colombia, and from Colombia to the OTP.

The Legal Framework for Peace

By June 2012, President Santos's new peace effort with the FARC required a new constitutional framework, and accordingly, the Colombian Congress approved a constitutional amendment known as the "Legal Framework for Peace" (*Marco Jurídico para la Paz*, hereinafter the LFP). The LFP represented a compromise between those who argued that peace with the FARC required full amnesties for war crimes and crimes against humanity, and those who argued that *any* pardon would be in breach of the Colombian constitution and international law.[69] The LFP allowed the Colombian Attorney General to focus on the "main perpetrators" of crimes, while giving the benefits of suspended sentencing or nonprosecution to all others, even in cases involving crimes that fell under ICC jurisdiction. The new framework thus marked a shift from the JPL and the peace process with the paramilitaries, which required,

[65] Jim Wyss, *El Tortuoso Camino que Llevó a la Paz en Colombia*, El Nuevo Herald (Sept. 24, 2016).

[66] *See generally* Enrique Santos Calderón, Así Empezó Todo: El Primer Cara a Cara Secreto Entre el Gobierno y las FARC en La Habana (2014).

[67] *See* James Verini, *The Prosecutor and the President*, N.Y. Times Mag., June 22, 2016, at MM44.

[68] *See, e.g.*, Fatou Bensouda, *We Are Not Against Africa*, New Afr. Mag. (2012), *at* http://newafricanmagazine.com/fatou-bensouda-we-are-not-against-africa.

[69] The description of the LFP is based on Urueña, Acosta Arcarazo & Buchan, *supra* note 21, at 298–99.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

at least in form, the prosecution of all perpetrators, not only those most responsible for the crimes.

When peace talks between the government and the FARC officially got underway in September 2012, they stirred hope for a war-weary country. However, the OTP intervened to express its dissatisfaction with the LFP framework providing the legal architecture for the peace process. The vehicle for delivering this message was an Interim Report on the Situation in Colombia (publication of which was an exceptional measure in its own right), in which the OTP strenuously emphasized the shortcomings of negotiations predicated on impunity for large numbers of perpetrators.[70] Prosecutor Bensouda was particularly critical of the case prioritization strategy, indicating that the OTP viewed with "concern any measures that appear designed to shield or hinder the establishment of criminal responsibility of individuals for crimes within the jurisdiction of the Court."[71] These were ominous words for the Colombian government, which was sitting at the bargaining table in Havana with the guerrillas. Bensouda was sending the opposite signal from that sent by Moreno-Ocampo: she made clear that any "impunity gap" resulting from case prioritization could trigger an ICC intervention.[72]

In light of the Colombian government's fundamentally different relationship with the FARC compared to the paramilitaries, the OTP's role differed in another important respect as well. On the one hand, its bargaining position was basically the same: the primary "stick" wielded by the OTP was possible prosecution of those who might otherwise be granted any measure of benefits for demobilization as a matter of political expediency. However, unlike in the peace process with the paramilitaries, the OTP's intervention with regard to the LFP had to begin from the premise that the Colombian government was clearly willing and able to prosecute the FARC's perpetrators. By contrast, the OTP's intervention with regard to the JPL was set against the historical complicity of the Colombian government with the paramilitaries.

The difference mattered for purposes of the ongoing investigation. In the JPL context, Moreno-Ocampo's goal was to apply political pressure to a government reluctant to prosecute its historical allies—a standard illustration of the positive complementarity dynamic. The question was whether Colombian institutions were willing to prosecute the paramilitaries. In contrast, in the context of the negotiation with the FARC, the OTP's role was not to pressure the government to investigate and prosecute the rebels, as the government had been doing so for the last three decades. Instead, the question became how to do it in the context of a peace process—namely how could local investigations and negotiations be structured so as to permit the peace process to move forward while not triggering an ICC intervention? More than exerting political pressure on local accomplices of the perpetrators, the OTP was thus drawn into matters of local criminal policy—an area in which the Colombian courts felt they should have a say.

[70] *See* OTP Situation in Colombia Report, *supra* note 40.

[71] *Id.*, para. 205.

[72] *Id.*, para. 204. On the other main point of the LFP—reduced and alternative sentencing—the OTP remained mostly silent. *Id.*, para. 206.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

The OTP's Influence on the Colombian Constitutional Court

These challenges would come to a head in 2013, when the Colombian Constitutional Court was called upon to review the LFP.[73] As the Court first convened to discuss the LFP in July 2013, the OTP sent a pair of letters to the president of the Court—an unprecedented move that sparked controversy in Colombia.[74] Each of the letters dealt with core features of the LFP as a legal framework for a peace process with the FARC: case prioritization; and the suspension of sentencing for perpetrators of war crimes or crimes against humanity. On the first issue, the OTP reiterated the position adopted in its 2012 Interim Report, and emphasized that its own international prosecutorial strategy (which allowed for case prioritization) should not necessarily be taken as the model for domestic prosecutorial strategies. On the suspension of sentencing, the OTP announced an unambiguous threshold: in its view, Colombia would be in breach of its international legal obligations if it suspended sentences for the "main perpetrators" of crimes subject to the jurisdiction of the ICC. In contrast to case prioritization—which, while suspect, was an arena where national policymakers enjoyed some discretion—no policy space existed for lawmakers to suspend sentencing, which would guarantee an ICC intervention in the peace process. For the OTP, "suspending sentences for those most responsible for war crimes and crimes against humanity would amount to shielding the persons concerned from criminal responsibility."[75] This cautionary message was not exclusively delivered to the Court: the OTP likewise communicated its view on sentencing suspensions to negotiators in Havana, in 2013.[76]

Despite these ominous warnings, the Colombian Court largely defied the OTP's strict interpretation. While it is difficult to definitively state that Bensouda's letter influenced the Constitutional Court in a particular way, its decision can be read as a response—or perhaps more accurately as a rebuke—to the OTP's attempted influence. In holding that case prioritization was acceptable, the Court defied the OTP's signal, but meanwhile remained within the area of indeterminacy that the OTP had carved out in its letter. With respect to suspended sentencing, however, the Court explicitly rejected the OTP's strict interpretation. The Court accepted, as the OTP suggested, that suspended sentences could *never* be given to perpetrators who were "most responsible" for crimes under the jurisdiction of the ICC.[77] However, if this requirement was not fulfilled, the Court implied, the sentence could be suspended. Thus, a perpetrator of crimes that fell under the jurisdiction of the ICC could see his sentence suspended if he was not labeled "most responsible" by the Colombian judiciary. This guidance from the Court directly contravened the OTP's position. Thus, while the

[73] *See* Corte Constitucional [C.C.] [Constitutional Court], Agosto 28, 2013, Sentencia C-579/13 (Colom.) [hereinafter Sentencia C-579/13].

[74] *See* Letter from Fatou Bensouda, ICC Prosecutor, to Jorge Iván Palacio, President of the Colombian Constitutional Court, Ref. 2013/0/FB/JCCD-evdu (July 26, 2013), *available at* http://www.ips.org/blog/cvieira/documento-fiscalia-cpi-sobre-cero-carcel-por-crimenes-de-su-competencia.

[75] James Stewart, *Transitional Justice in Colombia and the Role of the International Criminal Court* 11 (2015), *at* https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

[76] According to the ICC's Deputy Prosecutor, "This was done confidentially and in advance of formal negotiations on the sentencing issue in the peace talks. The step was prompted by [the OTP's] concern to alert the national authorities to [its] interpretation of the provisions of the Rome Statute in a timely way, and not after the fact, in view of the Government's stated interest in negotiating a peace agreement that was compatible with the Rome Statute." *Id.* at 11.

[77] *See* Sentencia C-579/13, *supra* note 73, para. 9.9.8.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

prosecutor still carried the stick of intervening when case prioritization led to an "impunity gap," or when a perpetrator of crimes that fell under the jurisdiction of the ICC had his sentence suspended, the Colombian Constitutional Court dramatically curtailed the influence of the OTP in this phase, by putting forward its own interpretation of international criminal law.

Domestic Pushback—and the OTP's Reaction

The LFP was enacted, but not implemented. The FARC rejected it on the basis that it was a unilateral move by the government that was never agreed to at the negotiation table.[78] However, the debate surrounding the LFP's adoption (and the ICC's decisive intervention) left important lessons. By 2014, the specific form of punishment for those subject to jurisdiction of the ICC had become one of the main issues in the OTP's preliminary examination in Colombia. As negotiations progressed in Havana, it became clear that FARC members would not accept any deal that included prison time, even for confessed crimes. Yet this was precisely where the OTP had suggested it would intervene in light of the unacceptability of suspending sentences.

After ten years of preliminary examination, however, Colombians had developed increasing facility with making international criminal law arguments, cutting their teeth in the debate surrounding the JPL and LFP. Many scholars, civil society organizations, and public servants—including those who could hardly be seen as favoring impunity for the FARC—advanced arguments for a flexible approach to punishment in the peace process. The Constitutional Court had done the heavy lifting of establishing the framework for alternative sentencing in 2013. Colombia's prosecutor, Eduardo Montealegre, also openly advocated for alternative sentences, even at his meetings with Prosecutor Bensouda—who was, at the time, still not convinced of the virtue of this approach.[79] Well-known civil society organizations, such as the International Center for Transitional Justice, also defended a more flexible approach.[80] Even former Prosecutor Moreno-Ocampo favored some form of alternative sentencing for the guerrillas.[81]

In this context, the Inter-American Court of Human Rights case law became, once again, a source of leverage with respect to the OTP's position. As previously discussed, in 2004, the IACtHR proved to be too strict where the OTP wanted flexibility. Ten years later, the opposite was true. In 2010, the IACtHR decided the *Masacre del Mozote* case.[82] In that case, the IACtHR dealt not with amnesties in the context of transition from dictatorships to democracies, as was the case of *Barrios Altos*, but with a peace agreement resulting from the armed conflict in El Salvador. The IACtHR accepted that a different, more flexible, standard had to be adopted in these cases, as international humanitarian norms were applicable, and the

[78] Redacción de Paz, *Gobierno y FARC Habrían Acordado no Tener en Cuenta Marco Jurídico para la Paz*, El Espectador (June 28, 2015).

[79] *Fiscal Eduardo Montealegre Desmiente Enfermedad: Entrevista*, El Tiempo (Oct. 27, 2014).

[80] Paul Seils, *Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace*, ICTJ Briefing (June 2, 2015), *at* https://www.ictj.org/sites/default/files/ICTJ-COL-Briefing-Punishments-2015.pdf.

[81] Santiago Martinez Hernández, *"Jefes de las FARC Deben Estar Dispuestos a ir Presos": Moreno Ocampo*, El Espectador (July 28, 2014).

[82] El Mozote & Lugares Aledaños v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012).

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

prospects for peace hung in the balance.[83] This case law bolstered Colombia's position that the OTP's desired standard was unrealistically strict and needed to change to accommodate reality.

In May 2015, the OTP signaled a shift in its position. In a public event in Bogotá, Deputy-Prosecutor James Stewart acknowledged that

> while the Rome Statute does provide for sentences in ICC proceedings, it does not prescribe the specific type or length of sentences that States should impose for ICC crimes. In sentencing, States have wide discretion. . . . Effective penal sanctions may thus take many different forms.[84]

The OTP was effectively conceding, and further signaling that alternative sentencing was acceptable, as long as the overall approach "serve[s] appropriate sentencing goals, such as public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct."[85]

The OTP may have been receptive to the Colombian pushback due to its previous experience in Uganda. Prosecutor Bensouda had argued that her office's intervention in that conflict was productive, as its arrest warrants brought the Lord's Resistance Army (LRA) to the Juba peace talks (2006–2008).[86] This rationale had been made explicit in 2006,[87] in an OTP brief that also acknowledged the absolute prohibition of amnesties for war crimes or crimes against humanity.[88] Such a strict line, though, may have put the OTP in a collision course with local efforts to achieve peace—particularly with regard to the 2000 Ugandan Amnesty Act.[89] For some Ugandans, the OTP was an obstacle for peace,[90] and certain local commentators faulted the OTP's intervention as one of the causes behind the collapse of the talks.[91]

The Ugandan experience, and Colombia's civil society insistence, may have nudged the OTP toward adopting a more flexible approach, as reflected in Deputy-Prosecutor Stewart's 2015 speech. It was this approach that finally made it into the peace agreement reached between the FARC and the Colombian government in August 2016. The agreement reflected an acute concern with international criminal prosecutions, referring at least a dozen times to the Rome Statute. Further, the agreement called for the creation of a Special

[83] *Id.*, paras. 283–86; Concurrent Vote, Diego García-Sayán, paras. 9, 10, 18, 20, 37–38.

[84] Stewart, *supra* note 75, at 10.

[85] *Id.*

[86] Fatou Bensouda, *International Justice and Diplomacy*, N.Y. TIMES (Mar. 19, 2013).

[87] Prosecutor v. Kony, ICC-02/04-01/05-116-Corr2, Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda, para. 25 (Oct. 6, 2006), *available at* http://www.legal-tools.org/doc/501e95.

[88] *Id.*, paras. 33–34.

[89] *See* Kasaija Phillip Apuuli, *ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT'L CRIM. JUST. 179–87 (2006).

[90] For example, the Acholi Religious Leaders Peace Initiative, a vocal civil society organization in Northern Uganda, was emphatically against the OTP's intervention. *See* Kasaija Phillip Apuuli, *Peace over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) vs. the International Criminal Court in Northern Uganda*, 11 STUD. ETHNICITY NATIONALISM 116–29 (2011).

[91] Yusuf Kiranda, *Juba Peace Talks Collapse*, KONRAD ADENAUER STIFTUNG (June 12, 2008), *at* http://www.kas.de/uganda/en/publications/13956.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

Jurisdiction for Peace, according to which case prioritization was to be allowed.[92] The Special Jurisdiction was designed to comply with the OTP's position that amnesties, or wholly suspended sentences for crimes under ICC jurisdiction, are not acceptable.[93] However, the agreement used the window that the prosecutor opened in 2015, and provided for alternative sentences to perpetrators of war crimes or crimes against humanity.[94] Thus, perpetrators that fully confess crimes that fall under the jurisdiction of the ICC were to serve a maximum of eight years of "effective restriction of freedom," which under "no circumstances will be understood as jail or prison."[95]

The OTP accepted the deal, at least in principle. In September 2016, it issued a press release celebrating the peace agreement. In the press release, the prosecutor accepted that the Special Jurisdiction for Peace would "focus on those most responsible for the most serious crimes committed during the armed conflict."[96] Most importantly, Prosecutor Bensouda "note[d], with satisfaction, that the final text of the peace agreement excludes amnesties and pardons for crimes against humanity and war crimes under the Rome Statute," and underscores the need for "effective punishment."[97] At no point in these comments, however, did the Prosecutor mention the requirement of actual prison time for war crimes or crimes against humanity—a marked departure from the OTP's prior stance.

On October 2, 2016, the people of Colombia narrowly rejected the peace agreement in a national referendum.[98] Interestingly, a major concern animating the "no" campaign was the perception that effective punishment would not be delivered under the peace agreement. In particular, this approach seemed to echo the early, more restrictive case law of the IACtHR and was vigorously promoted by the international NGO Human Rights Watch, for whom actual prison time was required for crimes falling under the jurisdiction of the ICC.[99] In contrast, local NGOs and the OTP—which had previously taken the hardest line on the need for robust punitive measures—were ready to lend cautious support to the deal. And yet, they seem to have exceeded the bounds of leniency that could be tolerated by the Colombian people (albeit by a narrow margin of 0.4 percent). Following the failed referendum, the parties were forced back to the negotiation table, and a revised deal was achieved a couple of weeks later. To avoid a new political defeat, the new deal was not put up to vote, but was approved by the Colombian Congress in November 30, 2016.

[92] Fuerzas Armadas Revolucionarias de Colombia, Ejército del Pueblo – FARC-EP & Gobierno de Colombia, *Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera* 266 (2016).

[93] *Id.* at 133, 136.

[94] *Id.* at 147.

[95] *Id.*

[96] ICC-OTP, *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Peace Negotiations Between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army* (Sept. 1, 2016), *at* https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia.

[97] *Id.*

[98] *See* Eric A. Heath, *Colombia Rejects Peace Deal with FARC After Plebiscite*, ASIL INT'L L. IN BRIEF (Oct. 7, 2016).

[99] *See* Human Rights Watch, *Human Rights Watch Analysis of Colombia-FARC Agreement* (Dec. 21, 2015), *at* https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

The OTP's Role in Implementation of the Peace Agreement

Once the deal was finally approved by Congress, Colombia had to enact the legal framework for the transitional justice process—a process in which the OTP again played a key role. In the early moments of implementation, the clearest instance of controversy concerned command responsibility of members of the military for the criminal conduct of their subordinates.[100] The original version of the Peace Agreement imposed a standard of "effective control" and "effective knowledge" of the commander.[101] That standard contradicted international law, as the latter imposed a less demanding requirement of control over the acts of subordinates.[102]

During the renegotiation after the plebiscite, the parties sought to adjust the original agreement, bringing it closer to international law. They agreed on a new text, according to which the standard should be that of Article 28 of the Rome Statute,[103] which was less demanding than the original text, and therefore allowed for easier prosecution of the military for command responsibility. But then, the Colombian government unilaterally withdrew the new text just hours before the official signing ceremony, perhaps as a response to the dissatisfaction of the Colombian military with the new standard.[104] At the end, references to the standard of Article 28 of the Rome Statute were dropped, and the language that served as the basis for the constitutional amendment of March 2017, which set the framework for the Special Peace Jurisdiction, was notably narrow, seemingly tailor-made to impose an almost prohibitive threshold for proving command responsibility of agents of the state.[105]

Facing this change, the OTP sprang into action. In a subsequent report on the peace process, it warned of the need for clarification regarding the content of command responsibility,[106] sending the unmistakable message that it would intervene if the Special Peace Jurisdiction failed to effectively prosecute military commanders.[107]

[100] This description of the bill is based on: René Urueña, *Playing with Fire: International Criminal Law, Transitional Justice, and the Implementation of the Colombian Peace Agreement*, 110 AJIL UNBOUND 364–68 (2016).

[101] Original Peace Agreement Between the Colombian Government and the FARC, 137 (Aug. 24, 2016).

[102] *See, e.g.*, ICTY, Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgment, para. 377 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment, para. 307 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008).

[103] Acuerdo Final Para la Terminación del Conflicto y la Construcció n de una Paz Estable Y Duradera, 152 (peace deal reached on Nov. 12, 2016, final written agreement released Nov. 24, 2016).

[104] Human Rights Watch, *Carta Sobre "Responsabilidad de Mando" en la Legislación de Implementación del Acuerdo de Paz* (Jan. 25, 2017), *at* https://www.hrw.org/es/news/2017/01/25/carta-sobre-responsabilidad-de-mando-en-la-legislacion-de-implementacion-del-acuerdo; *see also*, Oficina del Alto Comisiona de las Naciones Unidas, *El 'Toque' de los Militares a la Jurisdicción Especial para la Paz*, (Jan. 30, 2017), *available at* http://www.hchr.org.co/migracion/index.php/compilacion-de-noticias/368-jurisdiccion-especial-para-la-paz/8483-el-toque-de-los-militares-a-la-jurisdiccion-especial-para-la-paz.

[105] One further problem is that the constitutional amendment only speaks of command responsibility in the case of state agents, possibly excluding this form of criminal liability for FARC commanders. This oversight would be contrary to both Colombia's international obligations and the Peace Agreement itself. My interpretation is that command responsibility exists as a principle of criminal law, even if the constitutional amendment was silent. For the FARC, though, the applicable standard would not be that of the Amendment (which is restricted to agents of the state), but less demanding principles of international law, discussed below.

[106] *Corte Penal Internacional ya Examina el Nuevo Acuerdo de Paz con FARC. Dice que es Necesario Tener Más Claridad en Responsabilidad por Línea de Mando en Crímenes Graves*, EL TIEMPO (Nov. 18, 2016), *at* http://www.eltiempo.com/justicia/cortes/corte-penal-internacinal-examina-nuevo-acuerdo-de-paz-con-farc-47136.

[107] *ICC Chief Prosecutor Bensouda Threatens with Intervention in Colombia*, NSNBC INT'L (Jan. 27, 2017), *at* https://nsnbc.me/2017/01/27/icc-chief-prosecutor-bensouda-threatens-intervention-in-colombia.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

Thus, while the OTP's initial response to the agreement indicated that it had been transformed by Colombia as much as Colombia had been transformed by the OTP, the plebiscite and the resulting dynamics suggested that the process of transformation or evolution would continue—and could even produce calls for reengaging the OTP. There are valuable lessons about parallel international legal obligations and interinstitutional dynamics to be gleaned from the OTP's twelve years of engagement with the situation in Colombia.

Conclusion

The OTP's strategy in Colombia was to leave the preliminary examination open, in order to retain the ability to influence the prosecutorial decisions. This strategy, however, required the OTP to interact and negotiate with numerous other institutions and legal obligations, particularly the Inter-American human rights system and Colombia's extradition obligations to the United States. Moreover, at times, the OTP's influence was curtailed by domestic institutions that put forward their own interpretation of international criminal law, in opposition to the OTP's. As this Comment has demonstrated, the OTP's influence on the ultimate domestic prosecutorial strategy in Colombia has been less a product of design, and more the consequence of a process of interinstitutional interaction and adaptation that lies outside the control of any single state or international institution.

Two questions emerge in light of this observation. First, should there be time limits imposed on preliminary examinations? Colombia, for example, has been under such examination since 2004. National institutions have no way of knowing whether the preliminary examination will be over soon—a matter into which new uncertainty has been injected by virtue of the process of implementation. Uncertainty about the end of the examination period triggers local actors to adapt to the OTP's priorities, instead of adopting a static "wait it out" strategy that could otherwise be available if there was an established end date for the examination.[108] Thus, uncertainty enhances the OTP's influence. However, keeping the preliminary examination open also makes the OTP's agenda more vulnerable to the actions of local authorities. As time passes, the threat of prosecution becomes less credible, and the influence of the OTP increasingly depends on new phases of interaction with domestic authorities (rather than only on the OTP's purposeful signaling).

In light of the foregoing considerations, imposing statutory limits on the time length of preliminary examination seems to be of limited utility. In a case with a procedural posture and historical context like Colombia's (a *proprio motu* investigation in a context that attaches a high political cost to an ICC intervention), such limits might change the structure of incentives. If the threat of ICC prosecution is credible enough, then a time limit might increase the possibility of local prosecution. However, if the threat is insufficiently credible for political or logistical reasons (for example, if self-referrals or Security Council referrals stretch the OTP's

[108] This strategy has been explored in game theory. In games with infinite iterations, the possibility of cooperation is open, as there is not a "final" iteration where the dominant strategy is defection, as long as the player values sufficiently remaining in the game. Robert Axelrod, The Evolution of Cooperation 12–16 (rev. ed. 2006). The OTP's decision to leave the preliminary examination open, though, only opens the *possibility* of cooperation. It is not necessarily the case that cooperation is going to be the dominant strategy. As Axelrod explains, if the importance of the next move relative to the current move is sufficiently high (if the "discount parameter" is high), there is no best strategy independent of the strategy used by the other player. Interaction between the players becomes crucial.

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

resources too thin) then local authorities will have an incentive to stall until the expiration of the statutory time limit.

For the OTP, in turn, a time limit might strengthen its hand by making the threat of ICC prosecution more credible that an extended, open-ended preliminary examination; however, it would also limit its possible pathways for exerting influence. At the end of the time limit, the OTP's option would be either to intervene or withdraw. Instead, an open-ended preliminary examination period creates spaces for other forms of influence, such as those explored here.

There is a second question that emerges from the Colombia case study: how can the OTP most effectively navigate preexisting legal obligations? The "Rome system of justice" is not only a vertical ordering in which the ICC complements domestic jurisdiction, but also refers to the way in which the ICC interacts with other international legal regimes, such as international humanitarian law or human rights law. Recognizing the ICC as part of an interdependent international system of justice requires that complementarity be thought of in terms of the ICC's impact on the fulfillment of parallel legal obligations of the state with jurisdiction over the situation.

Careful consideration of the interaction of the ICC with other international legal regimes may lead to refinements in the meaning of, and the effects that can be attributed to, positive complementarity. As currently formulated, complementarity analysis focuses on inactivity, delays, and ability at the domestic level. But this could—and in light of the foregoing, arguably should—be supplemented. A new vision of complementarity would include examining the competing or complementary international legal obligations that are binding upon the national criminal jurisdiction under scrutiny, which is likely to produce a more holistic understanding of the situation in question.

The fulsome consideration of the weight to be given a state's other legal obligations[109] should not be undertaken in the abstract, but with reference to the specific situation examination. In the Colombian case, the OTP should have considered whether it needed to embrace the standards of the Inter-American system of human rights as cogent norms relevant to its preliminary examination. The OTP could have determined that such standards are acceptable complements for its test of complementarity, or, conversely, that they should be given no weight at all. The same question could have been addressed with respect to Colombia's extradition obligations.

The process of weighing competing or complementary legal obligations can be written into the OTP's policy on preliminary examinations. There is a statutory basis for taking this step. When the ICC's Pre-Trial Chamber merged the procedures of Article 15 and Article 53 of the Rome Statute in preliminary examinations, it held that the Statute's rules governing the admissibility of a "case" were the same as those governing the admissibility of a "situation." However, since there is no actual case and no actual individual being prosecuted, admissibility at the situation phase should be assessed against criteria defining a "potential case," including the people who are "likely to be the focus of an investigation" and "the crimes within the jurisdiction of the Court allegedly committed. . . ."[110]

[109] On "weight" as a dimension of global regulatory governance, see Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law*, 20 EUR. J. INT'L L. 23–57 (2009).

[110] Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 50 (Mar. 31, 2010), *at* https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF [hereinafter Kenya Decision].

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press

In this context, the question becomes how to assess complementarity in the context of "situations." The ICC Pre-Trial Chambers have thus far used the standard developed in the *Katanga* decision.[111] In order to assess complementarity, the Court must first define whether there are ongoing prosecutions, or whether there have been investigations, but with the result that the state with jurisdiction has decided not to prosecute. Only if there are prosecutions or investigations—that is, only if the Court is *not* facing a case of complete state inaction—must the Court assess whether the state is unwilling or unable genuinely to prosecute.[112]

In the case of complete inaction, the test of complementarity in "situations" and in "cases" is the same. In both contexts, the situation/case is admissible, because complete inaction proves that the requirement of complementarity is fulfilled. However, if there are prosecutions or investigations, the landscape changes. The test of complementarity in assessing the admissibility of a "situation" and a "case" must differ somehow, because the factual situation is clearly different. The latter refers to a particular proceeding against a specific defendant, while the former represents a wider frame, usually defined geographically. Therefore, in contrast with the narrower test of complementarity in a "case," the assessment of complementarity in a "situation" calls for the OTP to make an evaluation of the wider context where domestic prosecutorial decisions were made. This assessment could include not only state actions described in Article 17(2)–(3) with regard to the "potential case" but also the wider context in which these decisions are made.

When assessing the complementarity requirement of admissibility of a situation, the OTP would thus have to consider, as part of this wider context, which international legal obligations bind the state which has jurisdiction over the situation in question. These obligations predictably may affect its ability or willingness to prosecute. Naturally, these other obligations would have to be assessed against the state's legal obligations under the Rome Statue—with the result that sometimes the OTP would accept that they have weight and should be considered, whereas sometimes it would decide they are irrelevant for the purpose of the preliminary examination.

Even if this proposal was adopted, competing or complementary legal obligations would not, in themselves, be determinant of complementarity. The question remains, whether, under Article 17, the national criminal jurisdiction is actually investigating or prosecuting the "potential cases." However, factoring in these other international legal obligations may provide important elements for the OTP to explore whether a situation should be deemed admissible, particularly if the case is not one of complete inactivity. Is the state unwilling (or unable) to prosecute due to a competing international legal obligation? What is the weight that the OTP gives to such legal obligations in the context of a preliminary examination? These questions could be considered in light of principles along the lines proposed here. A dynamic assessment of this kind would allow the OTP to be a more effective player in the interdependent, mutually reinforcing international system of justice in which the ICC operates.

[111] Prosecutor v. Katanga, ICC-01/04-01/07 OA 8, Judgment on the Appeal of Mr Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, para. 78 (Sept. 25, 2009), *at* https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF.

[112] Kenya Decision, *supra* note 110, para. 53. Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, para. 193 (Oct. 3, 2011).

https://doi.org/10.1017/ajil.2016.3 Published online by Cambridge University Press